

Conducting civil proceedings in Jersey

Introduction

The Bailiwick of Jersey is a British Crown Dependency off the coast of Normandy and 120 miles south of England. It has its own parliament, known as the States of Jersey, and its own legal system and judicial function, which are separate from those of any other jurisdiction. It has fiscal autonomy from the United Kingdom.

In terms of the sources of Jersey law, Jersey has drawn historically in the sphere of property, contract and succession law on Norman French customary law. In other areas, such as tort and criminal law, the development of Jersey law has been heavily influenced by English law. As to trusts, so important and integral to the Island's finance industry, the Trusts (Jersey) Law 1984 as amended ("the Trusts Law") is very closely modelled on English trusts law. English legal authorities are regularly referred to in cases before the courts of Jersey. More recently, the shape of the Island's jurisprudence has been determined by statute passed by the States of Jersey.

In terms of civil procedure, the Royal Court of Jersey has enacted its own rules, the Royal Court Rules 2004 as amended ("the Rules"). These will be familiar to English practitioners who recall the days of civil procedure before the Woolf reforms. Based on the White Book 1999, the Rules regulate the conduct of civil matters before the Jersey Courts.

The Courts

For lower value cases (up to £10,000) the court of first instance is the Petty Debts Court which now has jurisdiction to hear both liquidated and unliquidated claims. It has its own procedural rules, distinct from the Rules.

The main civil court is the Royal Court presided over by the Bailiff or the Deputy Bailiff. The Bailiff is the Island's chief justice, president of the Royal Court and the civil head of the Island. Additionally, Commissioners are appointed to the bench, being lawyers drawn either from the ranks of Jersey Advocates or a highly respected senior English or Scottish barrister.

A unique feature of Jersey's judiciary is the fact that the Bailiff will in civil cases sit with two Jurats, who will generally not be lawyers. They are elected by members of the legal profession and members of the States of Jersey. Whilst they are lay members of the court, they are frequently elected to fulfil the role by virtue of having some particular experience. The Bailiff will decide questions of law (and costs) and the Jurats questions of fact (including quantum of damages). In the case of any disagreement, the Bailiff will have a casting vote.

The Royal Court exercises unlimited original jurisdiction both civil (for cases with a value exceeding £10,000) and criminal. The principal law now governing the constitution of the Royal Court is the Royal Court (Jersey) Law (1948) as amended, which also empowers the Royal Court to make the Rules for the exercise of its jurisdiction. There are four divisions of the Royal Court: *héritage* (property), family, probate and Samedi (covering all other matters). In addition to its judicial business, the Royal Court has other quasi-judicial and administrative functions (for example, it passes contracts for the transfer of immovable property, administers oaths and registers Orders in Councils).

The Judicial Greffier is the equivalent of a Master of the Courts of England and Wales. He has jurisdiction over a wide range of interlocutory matters. For example, parties apply to the Judicial Greffier to have the case set down and the Judicial Greffier will frequently hear applications for directions in less complex commercial disputes. In addition, parties can refer the assessment of damages to the Judicial Greffier under RCR 6/3. Other interlocutory matters, such as strike out, security for costs and summary judgment are generally handled by the Judicial Greffier. The Registrar of the Family Division exercises a similar function in the Family Court.

Appeals

Appeals against a judgment of the Petty Debts Court or the Judicial Greffier lie to the Royal Court, and appeals from the Royal Court lie to the Court of Appeal. The Court of Appeal of Jersey is composed of three judges drawn from a panel comprising the Bailiff or Deputy Bailiff, the Bailiff of Guernsey, Commissioners of the Royal Court and a panel of highly respected senior English or Scottish Q.C.'s, who often are on their way to high judicial office in England or Scotland. The Judicial Committee of the Privy Council is the ultimate Court of Appeal.

Instituting proceedings

The three main ways of instituting proceedings in Jersey are by way of simple action or summons, by Order of Justice or by Representation. Claims for liquidated debts are usually commenced by summons. Where a claim is disputed, the plaintiff will need to file Particulars of Claim to which the defendant will plead by way of an Answer. More complex cases require the preparation of an Order of Justice which sets out full particulars of the claim and the relief sought. This is a lengthier pleading similar to the Particulars of Claim in English proceedings. The Order of Justice is signed by the advocate acting for the plaintiff before being served personally on the defendant. Where the relief includes an injunction, the Order of Justice must be signed by the Bailiff, Deputy Bailiff or a Commissioner.

Service

Personal service is effected by the Viscount's department. Where personal service is not practicable, an application can be made to the Master for an order for substituted service whereby service can be effected by taking such necessary steps as the court directs for ensuring that the document to be served is brought to the attention of the person required to be served. A simple action or summons can be served by ordinary post.

Where the defendant or party cited is resident outside the jurisdiction, application must be made for service out. Under the Service of Process Rules 1994, no summons can be served outside the jurisdiction without leave of the Court. At first instance such applications are usually determined by the Judicial Greffier on a paper application. There is a Practice Direction regulating the requirements for an affidavit in support of service out.

Representations

It is useful to set out the procedure for Representations in some detail as experience shows that we are very frequently called upon to issue proceedings via Representation. Representations tend to be used in non-contentious actions (for example, an application for directions in respect of a trust under Art 51 of the Trusts Law). The procedure for a Representation is that the papers, including the Representation itself and the affidavit(s) in support, are filed with the Bailiff's Judicial Secretary by 12 noon on the Wednesday, and the matter is listed as an *ex parte* application at the Friday

afternoon sitting of the Samedi court. At that first hearing, the Court will make orders convening parties, appointing individuals to act as guardians or representatives of minors or unborn beneficiaries and ordering all parties to the Representation to appear at a future date (the return date), which will be not less than 4 clear days later.

The parties usually try and agree what will happen on the return date. The proceedings are often adjourned to a directions hearing (with the date to be fixed). Thereafter a directions hearing will be fixed for hearing before the Master of the Royal Court or before the Royal Court itself. Directions will include as to the filing of pleadings if required, the filing of any further evidence in the form of affidavits, whether there should be leave to cross examine thereon, and regarding discovery (although this is rare in circumstances where the core documents have already been put before the Royal Court as exhibits to the affidavits). There will also be directions as to exchange of bundles and skeleton arguments, and fixing a date for the substantive hearing itself.

Prescription

Under the Rules, the limitation period in respect of a cause of action will be interrupted by service of a summons, save that prescription will not be interrupted where the service is invalid, the action is discontinued or the defendant is discharged from the action. In terms of time periods, there is a ten year period for claims in contract and a much shorter three year period for claims in tort. The limitation period in actions for breach of trust is three years from the date on which either: (a) final accounts are provided to the beneficiary or enforcer or (b) the beneficiary or enforcer first has knowledge of the occurrence of a breach of trust, whichever period shall first begin to run (Art 57(2)(b) of the Trusts Law). There is a customary law maxim which can be prayed in aid of the suspension of limitation by means of an impediment preventing the plaintiff from knowing that he has a cause of action to pursue.

Tabling

Tabling is the method by which inter partes proceedings are brought to the attention of the Court for an initial appearance every Friday afternoon at what is known somewhat confusingly as the "Samedi Court". The Royal Court requires that the proceedings have been properly served. The procedure for tabling is that proof of service on the defendant is filed with the Judicial Greffe, or court office, together with a tabling fee. These formalities have to be attended to the day before the court sitting and if an Order of Justice is not tabled the action is discontinued. If the Order of Justice contains injunctions these therefore lapse. Failure to table properly can also have adverse consequences in respect of limitation, since the discontinuance of the action will mean that the limitation period continues to run and is no longer interrupted.

When proceedings are served on the defendant or party cited, they will be accompanied by a summons requiring the defendant to attend Court usually on the Friday afternoon. At that hearing, if the defendant wishes to defend the claim, he may ask the court to place the matter on what is termed the pending list. Thereafter, the defendant has 21 days in which to file an Answer to the claim unless the period is extended by agreement between the parties or on an application being made to the Master. If a defendant fails to appear at the first sitting of the court, or fails to file an Answer in time, the plaintiff may apply for judgment in default under RCR 6/6(6).

Dispute as to jurisdiction

As in England there is scope within the Rules (RCR6/7) for a party to dispute whether Jersey is the appropriate jurisdiction for trial or whether documents have been properly served. In such a case,

the party disputing jurisdiction may take the limited step of asking the court to place the case on the pending list, but under protest as to jurisdiction. He must then apply, within 28 days, to the Bailiff, in chambers, to fix a date for the hearing of his application pursuant to RCR 6/7. Detailed grounds are required when that application for a hearing date is made and so, in practice, the 28 day period may often prove to be a tight deadline.

Security for costs

A recent Court of Appeal decision (*Leeds v Admatch*) has revolutionised the approach on an application for security for costs in Jersey. Previously, the general rule was that where a plaintiff was resident outside the jurisdiction and had no assets here an order for security for costs should be made unless there were unjust or exceptional circumstances (for example, the risk of oppression). The Court of Appeal in *Admatch* followed recent English authority, which had held, inter alia, that to treat the foreign residence of a plaintiff as justification for such an order was discriminatory pursuant to the ECHR because, in like circumstances, security would not have been ordered against a plaintiff resident in England. Accordingly, the Court of Appeal considered that no security should have been granted and ordered that it be repaid in full. As a consequence of *Admatch*, being sued by a foreign plaintiff is no longer enough in itself to justify an order for security for costs. A defendant must show that it would actually be difficult to enforce a Jersey costs judgment abroad against the plaintiff. Even if successful, the security to be paid by the plaintiff will no longer reflect the amount of costs likely to be incurred by the defendant defending the case but will be limited to the future costs of enforcement.

Discovery, witness statements and expert report

The Rules provide for the orderly filing of pleadings in any case as well as various other interlocutory applications that might be made at the same time. These might include an application to seek further particulars of a pleading. There may be applications to amend or to strike out a case or part of it. In addition, where the plaintiff has been dilatory in the prosecution of its claim, there may be an application for dismissal for want of prosecution.

Once the pleadings phase is complete, the action will be set down for hearing and a date will be fixed for trial. This is done by way of an application made by the plaintiff to the Master which must be issued within one month of the close of pleadings. If the plaintiff does not issue a summons for directions within that time, the defendant or any other party to the action may do so. If a summons for directions is not issued within two months after the time limited for filing pleadings, the court may give notice of 28 days and then dismiss the action.

If a summons for directions has been issued, the Master will usually make an order for discovery. The discovery procedure requires the listing of all relevant documents relating to the cause or matter in dispute. The parties to an action must each list all relevant documents and the list must be verified by an affidavit sworn by the party concerned (**please see our note on the discovery obligation**). Directions will also be handed down in respect of the exchange of witness statements and experts' reports prior to trial.

Trial Dates

Once the parties have complied with their discovery obligations, a date for trial can be fixed with the Bailiff's Judicial Secretary. For a complex case, it is common to assign the action to a particular Commissioner or the Bailiff / Deputy Bailiff to ensure continuity of case management.

Costs

The jurisdiction to award costs is derived from Article 2 of the Civil Proceedings (Jersey) Law 1956 and is in the discretion of the Court, and the Court has full power to determine by whom and to what extent the costs are to be paid. Generally, the principle that costs follow the event applies so that the successful party ought to obtain an order for his costs to be paid by the unsuccessful party. However, there is a discretion to depart from this as it is by no means always apparent that a clear winner has emerged from the litigation and the Royal Court has frequently made issue-based costs orders to reflect the reality of the outcome where several issues are at stake. The award of costs may be either on the standard basis or the indemnity basis. Orders for indemnity costs require the presence of special or unusual features, although unreasonable conduct in the litigation can give rise to an indemnity costs order.

Payment into Court

A party may protect its position in costs by making a payment into court. If the plaintiff accepts the payment into court, he will usually be entitled, in addition to the payment in, to payment of his costs (to be taxed if not agreed) up to the time of acceptance of the payment into court. If the payment into court is not accepted, the action proceeds in the normal way. If, at trial, the plaintiff recovers less than the amount of the payment into court, he will be likely have to pay not only his own, but also the other party's, costs incurred from the date of payment in. In some cases, where it is not possible to satisfy a claim by way of payment of a specified sum, a party may protect its position by making a settlement offer in correspondence on what is known as the "Calderbank basis", in other words where the letter is marked "without prejudice save as to costs". Such a letter cannot be referred to in court until the case is determined but it is admissible in any argument as to costs.

Enforcement

In Jersey, a court judgment usually carries with it permission to distrain upon the assets of the judgment debtor together with an arrest on wages, if appropriate. Enforcement within the Island is effected through the Viscount's enforcement section. Enforcement of Jersey judgments is available outside the jurisdiction, reciprocally, in England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey.

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